

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
Zaclon, Incorporated,)
Zaclon LLC, and) Docket No. RCRA-05-2004-0019
Independence Land Development Company,)
)
Respondents)

**ORDER ON RESPONDENTS' MOTION FOR CLARIFICATION OF LEGAL
IMPACT OF COMPLAINT OR IN THE ALTERNATIVE MOTION FOR STAY**

The Complaint, as amended, filed in this action by the U.S. Environmental Protection Agency (EPA or the Agency), Region 5, on October 14, 2005, charges Respondents (sometimes collectively referred to herein as "Zaclon"), with two counts of violating the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. §§ 6901 *et seq.* Specifically, Count 1 alleges that Respondents own and operate a facility at which hazardous wastes, specifically, sash and baghouse dust, were stored without a permit or interim status for at least six years prior to Agency sampling on September 19, 2002, in violation of Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), and the state regulations implementing this provision, Ohio Administrative Code (OAC) 3745-50-45. Count 2 alleges that Respondents illegally received, stored and treated hazardous waste, namely spent stripping acid, without a permit or interim status in violation of RCRA Section 3005(a) and OAC 3745-50-45.

By Order dated November 3, 2005, Accelerated Decision in favor of Complainant was granted in regard to Respondent's liability as to Count 1. On February 3, 2006, the parties filed Cross Motions for Accelerated Decision as to Count 2, requesting judgment as to Respondents' liability for the alleged violation regarding stripping acid. By Order dated May 17, 2006, Complainant's Motion for Accelerated Decision as to Respondents' liability on Count 2 was denied as to liability, but granted to the extent that the subject stripping acid was found to be a "spent material." The question of whether such material was "reclaimed" and thus also the question of whether Respondents are liable for Count 2 remained contested issues for hearing. A hearing was held from June 6 through 9, 2006 for presentation of testimony and evidence on the issues of Respondent's liability on Count 2 and the appropriate penalty, if any, to be imposed for the violation(s) found. The parties are currently in the process of filing their post-hearing briefs and no initial decision has yet been rendered in this matter.

By Motion dated July 21, 2006, Respondents move for clarification of the "legal impact" of the Complaint or in the alternative for a stay. Respondents request issuance of an order stating that there has been no final finding by the United States Environmental Protection Agency

(EPA) contrary to the assumption that Respondents' use of the stripping acid was RCRA exempt. In the alternative, if the Complaint is an effective action of EPA, then Respondents request that its effect be stayed pending a final decision.

The Motion alleges that, for many years, Zaclon and its suppliers of the stripping acid relied upon a letter sent in 1994 by the Ohio Environmental Protection Agency indicating that the stripping acid was "RCRA exempt," i.e., not regulated under RCRA as a "hazardous waste." The Amended Complaint filed by U.S. EPA as indicated above asserts that the stripping acid is a hazardous waste which should have been and must be received, stored and treated as such in compliance with RCRA. Zaclon states that as a result of the filing of the Complaint, and its suppliers' receipt of requests for information from Complainant regarding the stripping acid, its suppliers are "understandably concerned regarding their legal jeopardy in sending stripping acid to Zaclon," and recently notified Zaclon that because of this they had decided to cease shipments of stripping acid to Zaclon (Motion, Exhibit A (Zaclon LLC "Trade Report"), and therefore approximately 80 percent of the shipments of stripping acid to Zaclon have stopped, as stated in an Affidavit of James Krimmel, president of Zaclon. Motion, Exhibit B. Respondents represent that "[a]s a result, the entire manufacturing process of zinc ammonium chloride may be seriously impaired," as they provide 75 percent of the zinc ammonium chloride in the United States market. Respondents represent that Complainant's own witness testified that the productive recycling of stripping acid to produce zinc ammonium chloride is "far preferable to the alternative disposal of this material" from an environmental standpoint. Tr. 276.¹

Therefore, Respondents file the motion "to clarify the legal limbo Zaclon and its suppliers now find themselves in." While Zaclon acknowledges that the pending issues are "complex, technical, and difficult," that the hearing transcript is 1,000 pages and includes substantial expert testimony, and that there are dozens of exhibits to be considered, it fears that without pre-decisional clarification, should it prevail, such victory "may prove pyrrhic."

On July 27, 2006, Complainant filed a Response to Respondent's Motion. In the Response, Complainant notes that in September 2005, one month prior to amendment of the Complaint to add the allegations regarding the stripping acid, EPA Region 1 had issued a

¹ Respondents refer to the following testimony of Dr. Douglas Kendall (Tr. 276):

Q: So if you were manufacturing flux . . . and you had the choice, would it better serve the environment, be a better way to manufacture flux using stripping acid or using pure zinc?

A: No, the best way would be to use stripping acid if you used it correctly, if you handled it correctly and safely.

Q: So that would be the environmental, beneficial way to do this?

A: As long as you handled it safely and protected the public health, it's a good idea.

“Regulatory Interpretation” advising one of Zaclon’s major suppliers of stripping acid that EPA considered the acid to be a hazardous waste under RCRA. A few months thereafter, the Agency advised the supplier by letter that Zaclon’s decision to contest Region V’s “enforcement action” did not stay the requirements of RCRA regarding the handling of such acid and that unless and until Zaclon prevails in any litigation, the Agency’s “interpretation will stand.” Response at 2. The letter stated that “[w]e strongly urge you to follow RCRA requirements as interpreted by the relevant States and the EPA,” and that “RCRA requires that your hazardous spent material being reclaimed be handled as a hazardous waste while on site at your generating facility.” Response at 3; Complainant’s Exhibit 29. Complainant suggests that the Regulatory Interpretation and subsequent letter, more than the Complaint, which spurred the supplier to cease shipping the acid to Respondents as if it was nonhazardous waste. It characterizes the Motion as a request to issue an order “designed to comfort Zaclon’s suppliers and encourage them to resume the illegal shipment of hazardous waste to Zaclon in defiance of the RCRA regulations.” Response at 1-2. It requests that Respondents’ “unexpected and surprising motion” be denied.

Whether the stripping acid Zaclon has been receiving from its suppliers is or is not hazardous waste under RCRA, which is based on the question of whether or not it is or is not “reclaimed,” is the pivotal issue remaining in this case. This issue is factually and legally complex, and was the focus of the extensive testimony, both expert and non-expert, and multitude of exhibits and arguments presented at the four-day hearing. While this Tribunal empathizes with the financial and operational hardship placed upon Respondents and the suppliers by the pendency of this action, and the market and environmental concerns of Respondents are noted and understood, no forecast or preliminary ruling on the contested issues or outcome of this pending litigation can be provided. The record of this proceeding must be carefully reviewed and a formal written decision must be issued as to the disputed issues in this case.

However, there appears to be some confusion on the part of the parties concerning the enforceability of interpretations of the regulations. Respondents state that “[i]t is only after this [Environmental Appeals] Board issues its order is there [sic] a final legally enforceable action of USEPA.” Motion at 3. On the other hand, Complainant states that the suppliers “illegally sent spent stripping acid, a spent material and hazardous waste, to Zaclon for reclamation” and refers to the “Regulatory Interpretation” and follow-up letter referenced above, which asserts that “unless and until Zaclon prevails . . . our interpretation will stand.” Response at 1, 2.

Therefore, Respondents’ Motion for Clarification is **GRANTED** to the extent that the following explanation of the litigation process is provided.

The regulations at issue in this proceeding are binding and their enforceability is not contested here. The interpretation of the regulations as applied to the stripping acid received by Respondents is contested in this proceeding. The Chief of the Chemical Management Branch of EPA Region 1 issued a Regulatory Interpretation, and a follow-up letter, to Respondents’ major supplier, expressing an interpretation of the regulations as applied to its stripping acid. The Complainant’s assertion in its Response and other briefs and pleadings filed in this proceeding to the effect that the stripping acid is a hazardous waste and was “illegally sent” to Zaclon is merely

a position taken by the Complainant in the context of this proceeding. Respondents' suppliers run the risk of action being taken against them on the basis of any interpretation, position or belief of EPA, EPA Regional Office, division or sub-division thereof, that the stripping acid is a hazardous waste, and this pending litigation does not prevent such action being initiated. It is not within the purview of this Tribunal to interfere with the Agency's authority to take action against those members of the regulated community which it believes have in the past or currently are violating environmental laws.

However, as to the finality of any documents in the context of this litigation, the Complaint in this matter merely sets forth allegations, including the allegation that the stripping acid is a hazardous waste under RCRA. These allegations are not binding and do not represent any "decision" by the EPA. Respondents have denied that stripping acid is a hazardous waste, and therefore this matter is in litigation. A decision has been made that stripping acid is a "spent material," but no decision has been made yet as to whether it is a hazardous waste. A written "initial decision" will be issued, deciding either that the stripping acid is a hazardous waste, or that it is not a hazardous waste. If in the "initial decision," it is determined that the stripping acid is not a hazardous waste, then Count 2 of the Complaint will be dismissed.

The initial decision may be appealed to the Environmental Appeals Board (EAB) by Complainant or Respondent, or both, within thirty days after it is served on the parties to this litigation. If it is appealed, then the decision by the EAB is the final decision of EPA. If it is not appealed within that time, and the EAB does not choose to review the initial decision on its own initiative, then the initial decision becomes the final decision of the EPA 45 days after service of the initial decision on the parties. 40 C.F.R. Section 22.27(c). A final order issued by the EAB may be appealed by Respondent to a Federal district court with jurisdiction over this matter.

Respondents' Alternative Motion for Stay is hereby **DENIED as moot**.

Susan L. Biro
Chief Administrative Law Judge

Date: August 22, 2006
Washington, D.C.